TRUSTEES OF LEONG SAN TONG KHOO KONGSI (PENANG) REGISTERED & ANOR

v.

LEE BOON TIN

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: P-02-320 OF 1996]
21 AUGUST 1998

CIVIL PROCEDURE: *Striking out - Want of prosecution - Governing principles - Delay in filing writ - Whether delay inordinate and inexcusable - Whether defendant prejudiced - Post writ delay - Delay to set down action for trial - Whether defendant had shown more than a minimal additional prejudice resulting from post writ delay - Rules of the High Court 1980, O. 25 r. 1, O. 34 r. 2*

CIVIL PROCEDURE: *Striking out - Want of prosecution - Inordinate and inexcusable delay - Inordinate delay involving a complete disregard of the rules of court such as to amount to an abuse of process - Whether by itself a ground for striking out - Whether unnecessary to prove prejudice - Rules of the High Court 1980, O. 25 r. 1, O. 34 r. 2*

The respondent's premises were demolished by the appellants in 1987 and the respondent in consequence sued the appellants for damages for trespass and for loss of chattels. The writ action in question, however, was only instituted by the respondent in 1993, ie, about five years and 11 months later. The facts also showed that, for about one year and nine months after the pleadings were closed on 28 October 1993, the respondent did nothing to set up the case for hearing, and only filed the summons for directions on 29 August 1995. These delays apart, the respondent was also not prompt in serving the summons for directions, and service thereof was only effected after the court had issued a show cause notice to strike out the action for want of prosecution. In any case, on 6 February 1996, the appellants applied to strike out the respondent's writ and claim for want of prosecution, and argued that striking out, in the circumstances, was warranted as (i) the respondent was guilty of an inordinate and inexcusable delay within the meaning of O. 34 r. 2 of the Rules of the High Court 1980 ('RHC'), and of O. 25 r. 1 thereof, and (ii) such delay had prejudiced them in their defence of the action, as some of their employees who were involved in the demolition exercise had left their employ and could not be traced.

The respondent did not offer any credible excuse for the delay, and nor did he challenge the appellants' latter assertion aforesaid. The learned judge ruled nonetheless that whilst the respondent was guilty of inordinate and inexcusable delay he was not guilty of 'grossly inordinate delay', and further that there was no substantial risk of a fair trial as the appellants had not identified the witnesses who had left their employ, and who were since untraceable. The application to strike out was hence dismissed, whereupon the appellants appealed. The main issue that arose was whether the application to strike out the writ and claim, in the circumstances, ought to have been allowed by the trial court.

Held:

Per Mokhtar Sidin JCA

[1] Considering O. 34 r. 2 of the RHC, and *Birkett v. James* among others, it is clear that an action is liable to be dismissed for want of prosecution (i) if the plaintiff's default has been intentional and contumelious or (ii) if the plaintiff is guilty of such inordinate and inexcusable delay that the defendant had been prejudiced by it. Prejudice here is not confined to prejudice that adversely affects the adducement of evidence in court, but includes prejudice which a defendant would have suffered due to delay such as affecting the limitation period, the proceeding of a fair trial, or the defendant's business interest.

[2] The law only states that there must be inordinate and inexcusable delay and that the defendant must be prejudiced by it. The learned judge was therefore wrong in concluding that the appellants could succeed only upon 'grossly inordinate delay'. It is also clear that, since the learned judge has made a finding of inexcusable and inordinate delay, the only issue that arose was whether the appellants were prejudiced by that delay.

[3] The respondent did not deny or challenge the appellants' assertion that the issues here were based on facts, that with the passing of time the memory of the witnesses are vague, and that some of the witnesses had already left the appellants' employment and were not traceable. The respondent must therefore be deemed to have accepted these assertions. That being so, the learned judge had also erred in holding that there was no question of substantial risk of a fair trial as the appellants had failed to identify the material witnesses who had allegedly left their employ.

[4] The present action, being an action for trespass and dependent upon the testimonies of witnesses for its determination, should be proceeded upon with haste. Clearly, the evidence of the appellants' employees involved in the demolition of the respondent's premises is important to rebut the

allegations by the respondent. Due to the inordinate and inexcusable delay on the part of the respondent in instituting the action, however, some of the appellants' witnesses could no longer be traced. It is obvious that the appellants might be prejudiced of a fair trial because of this.

[5] Upon the authority of *Department of Transport v. Chris Smaller*, the appellants need to show something more than the minimal prejudice as a result of the post writ delay in order to succeed. There clearly was post writ delay here when the respondent did nothing for more than twenty one months to set up the case for hearing, or when he waited until a show cause letter had been issued by the court before effecting service of the summons for directions on the appellants. And, when the appellants stated in the affidavit that their witnesses who had carried the demolition could no longer be traced, they had in fact showed that they had been prejudiced of a fair trial. The respondent did not deny or dispute this.

[6] As shown by the cases of *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors* and *Choraria v. Sethia*, apart from the two limbs in *Birkett v. James*, there seems to emerge an additional limb to strike out a plaintiff's claim on ground of delay, namely, that, where there is inordinate and inexcusable delay which involves a complete, total and wholesale disregard of the rules of the court, such as to amount to an abuse of process, the action may be struck out on that ground even without any proof of prejudice. In this case, the respondent and his solicitors have not taken any step to dispose of the litigation within reasonable time and have also totally disregarded the time schedule given by the Rules. The present case, therefore, falls squarely on what had been decided in the two decisions aforesaid.

[Appeal allowed; order of court below set aside; respondent's claim set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Premis-premis responden telah dirobohkan oleh perayu-perayu dalam tahun 1987 dan akibatnya responden telah mendakwa perayu-perayu untuk gantirugi bagi pencerobohan dan kerana kehilangan barang. Tindakan writ berkenaan bagaimanapun, telah hanya dimulakan oleh responden dalam tahun 1993, iaitu lebih kurang lima tahun dan 11 bulan kemudian. Fakta-fakta juga menunjukkan bahawa, selama lebihkurang satu tahun sembilan bulan selepas pliding ditutup pada 28 Oktober 1993, responden telah tidak melakukan apa-apa untuk menetapkan kes untuk perbicaraan, dan hanya memfailkan saman untuk arahan pada 29 Ogos 1995. Selain daripada kelewatan-kelewatan ini, responden juga tidak segera menyampaikan saman untuk arahan tersebut, dan penyampaiannya hanya laksanakan setelah mahkamah mengeluarkan notis tunjuk sebab untuk

membatalkan tindakan tersebut kerana ketiadaan pendakwaan. Walau apa pun, pada 6 Februari 1996, perayu-perayu telah memohon untuk membatalkan writ dan tuntutan responden kerana ketiadaan pendakwaan, dan berhujah bahawa pembatalan, dalam keadaan tersebut, adalah wajar kerana (i) responden bersalah atas kelewatan yang melampau dan tidak boleh dimaafkan menurut maksud A. 34 k. 2 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'), dan A. 25 k. 1 di situ, dan (ii) kelewatan yang sedemikian telah memudaratkan mereka dalam pembelaan mereka terhadap tindakan tersebut, kerana sebilangan daripada pekerja-pekerja mereka yang terlibat dalam kerja-kerja merobohkan itu telah pun berhenti daripada berkhidmat dengan mereka dan tidak dapat dikesan.

Responden tidak menawarkan apa-apa alasan yang munasabah bagi kelewatannya tersebut, dan juga tidak mencabar penegasan perayu yang terkemudian di atas. Hakim yang bijaksana berhujah bahawa sementara responden bersalah atas kelewatan yang melampau dan tidak dapat dimaafkan, beliau tidak bersalah atas "grossly inordinate delay", dan selanjutnya bahawa tidak terdapat risiko substantial untuk satu perbicaraan yang adil kerana perayu-perayu telah gagal mengenal pasti saksi-saksi yang telah berhenti dari berkhidmat dengan mereka, dan yang dikatakan tidak dapat dikesan itu. Permohonan untuk membatalkan telah dengan itu ditolak, dan perayu-perayu telah merayu. Isu utama yang berbangkit adalah samada permohonan untuk membatalkan writ dan tuntutan disini, dalam keadaan yang wujud, seharusnya dibenarkan oleh mahkamah perbicaraan.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Dalam mempertimbangkan A. 34 k. 2 KMT, dan *Birkett v. James* antara lainnya, ianya jelas bahawa sesuatu tindakan akan ditolak kerana ketiadaan pendakwaan (i) jika kemungkiran plaintif disengajakan dan bersifat menghina atau (ii) jika plaintif bersalah di atas kelewatan yang melampau dan tidak boleh dimaafkan yang sebegitu rupa hinggakan defendan telah dimudaratkan olehnya. Kemudaratan di sini tidak terhad kepada kemudaratan yang menjejaskan pengemukaan keterangan dalam mahkamah, tetapi termasuk kemudaratan yang dialami defendan disebabkan kelewatan tersebut yang menjejaskan tempoh penghadan, perjalanan suatu perbicaraan yang adil, atau kepentingan perniagaan defendan.

[2] Undang-undang hanya menyatakan bahawa harus terdapat kelewatan yang melampau dan yang tidak boleh dimaafkan serta bahawa defendan semestinya terjejas olehnya. Hakim yang bijaksana dengan itu salah dalam membuat keputusan bahawa perayu-perayu boleh berjaya hanya atas "grossly inordinate delay". Ianya adalah juga jelas bahawa, oleh kerana hakim yang bijaksana telah

membuat keputusan mengenai kelewatan yang tidak boleh dimaafkan dan yang melampau, satu-satunya isu yang berbangkit adalah samada perayu-perayu telah dimudaratkan oleh kelewatan ini.

[3] Responden tidak menafikan atau mencabar penegasan perayu-perayu bahawa isu-isu di sini telah diasaskan pada fakta-fakta, bahawa dengan berlalunya masa peringatan saksi-saksi semakin kabur, dan bahawa sebilangan daripada saksi-saksi tersebut telah pun berhenti daripada berkhidmat dengan perayu-perayu dan tidak dapat dikesan. Responden dengan itu semestinya dianggap sebagai telah menerima penegasan-penegasan ini. Oleh itu, hakim yang bijaksana telah juga tersalah dalam memutuskan bahawa tidak terdapat persoalan mengenai risiko substantial terhadap suatu perbicaraan yang adil kerana perayu-perayu telah gagal untuk mengenalpasti saksi-saksi penting yang dikatakan telah berhenti dari berkhidmat dengan mereka.

[4] Tindakan semasa ini, yang merupakan satu tindakan pencerobohan dan bergantung pada testimoni-testimoni saksi-saksi untuk penentuannya, seharusnya segera diteruskan. Adalah jelas, keterangan pekerja-pekerja perayu yang terlibat dalam merobohkan premis-premis responden adalah penting untuk mematahkan dakwaan-dakwaan oleh responden. Disebabkan oleh kelewatan yang melampau dan yang tidak boleh dimaafkan oleh responden dalam memulakan tindakan tersebut, sebilangan dari saksi-saksi perayu telah tidak dapat dikesan. Ianya adalah jelas bahawa perayu-perayu mungkin terjejas daripada mendapat satu perbicaraan yang adil kerana perkara ini.

[5] Atas autoriti *Department of Transport v. Chris Smaller,* perayu-perayu perlu menunjukkan sesuatu yang lebih daripada kemudaratan yang minima disebabkan oleh "post-writ delay" untuk berjaya. Adalah jelas bahawa terdapat post writ delay disini apabila responden tidak melakukan apa-apa selama lebih daripada dua puluh satu bulan untuk menetapkan kes untuk perbicaraan, atau apabila beliau menanti sehingga satu surat tunjuk sebab dikeluarkan oleh mahkamah sebelum melaksanakan penyampaian saman untuk arahan ke atas perayu-perayu. Dan, apabila perayu-perayu menyatakan dalam afidavit mereka bahawa saksi-saksi mereka yang telah menjalankan kerja-kerja merobohkan itu tidak lagi dapat dikesan, mereka telah pada hakikatnya menunjukkan bahawa mereka telah dimudaratkan daripada mendapat satu perbicaraan yang adil. Responden tidak menafikan ataupun mempertikaikan perkara ini.

[6] Sepertimana yang ditunjukkan oleh kes-kes *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors* dan *Choraria v. Sethia,* selain daripada kedua-dua bahagian dalam *Birkett v. James,* nampaknya berbangkit satu bahagian yang baru untuk membatalkan tuntutan plaintif atas alasan kelewatan, iaitu, bahawa, dimana terdapat kelewatan yang melampau atau yang tidak dapat dimaafkan yang mana melibatkan ketidak-hirauan yang menyeluruh dan total

akan kaedah-kaedah mahkamah, hinggakan membawa kepada satu penyalahgunaan proses, tindakan tersebut boleh dibatalkan atas alasan itu walaupun tanpa sebarang bukti kemudaratan. Dalam keadaan ini, responden dan peguamcaranya telah tidak mengambil sebarang langkah untuk menyelesaikan litigasi tersebut dalam tempoh yang sewajarnya dan telah sesungguhnya tidak menghiraukan jadual masa yang telah diberikan oleh kaedah-kaedah. Kes semasa, dengan itu, sesungguhnya terlingkung atas apa yang telah diputuskan dalam kedua-dua keputusan yang tersebut di atas.

[Rayuan dibenarkan; perintah mahkamah di bawah diketepikan; tuntutan responden diketepikan.]

Cases referred to:

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Others [1997] TLR 698 ***(refd)***

Birkett v. James [1978] AC 297 ***(refd)***

Chishty Coveney & Co v. Raja [1998] TLR 43 ***(refd)***

Choraria v. Sethia ***(refd)***

Department of Transport v. Chris Smaller (Transport) Ltd [1989] 1 All ER 897 ***(foll)***

Hongkong Bank (M) Bhd v. Raja Letchumi Ramarajoo & Ors [1996] 4 CLJ 155 ***(foll)***

Toh Hock Thye & Ors v. Toh Chwee Biow [1981] 1 CLJ 87 ***(foll)***

Vasudevan v. T Damodaran & Anor [1981] 1 CLJ 84 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 25 r. 1, O. 34 rr. 2, 8(2)

For the appellants - R Rajasingam (Raj Shankar with him); M/s R Rajasingam & Co

For the respondent - M Thayalan; M/s Meena, Thayalan & Partners

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-347-93 (MT2)]

Reported by Rusnah Abd Aziz

JUDGMENT

Mokhtar Sidin JCA:

The appellants in this appeal appealed against the decision of the learned judge in Penang who had dismissed the appellants' application to strike out the respondent's writ and statement of claim. On 22 September 1993 the respondent took out a writ against both appellants for damages suffered by him when the appellants and their agents demolished his premises, his store and also his fruit trees. The appellants entered appearance on 1 October 1993 and on 14 October 1993 the appellants filed their statement of defence. This was served on the respondent. On 28 October 1993 the pleadings were deemed to be closed by virtue of the fact that fourteen days had elapsed from the

date the statement of defence was served on the respondent. Under O. 25 r. 1 of the Rules of the High Court 1980, summons for directions is to be taken out within one month after the statement of defence is served. The last date under that rule to take out the summons for directions was 27 November 1993. The respondent filed his summons for directions only on 29 August 1995. This was not served on the appellants. As such there was a delay of one year and nine months from the date the pleadings were deemed to be closed until the respondent filed his summons for directions. On 18 January 1996 the court issued a notice to show cause why the respondent's claim should not be struck out for want of prosecution. This application was heard on 30 January 1996 but no order was made.

On 6 February 1996 the appellants filed this application by way of summons in chambers to strike out the respondent's writ and statement of claim for want of prosecution and served it on the respondent. On 13 February 1996 the respondent's solicitors served his affidavit in reply. In the meantime, on 8 February 1996 the respondent served on the appellants the summons for directions which was filed on 29 August 1995. Thus there was a further delay of five months. The summons for directions was fixed for hearing on 18 March 1996 before the senior assistant registrar. The senior assistant registrar heard the summons for directions and ordered that the parties do serve on each other a list of documents and an affidavit verifying such list within 60 days and that there be the inspection of documents within 30 days.

The appellants' complaint is that the respondent's delay in filing the summons for directions by one year and nine months is inordinate and inexcusable. The learned trial judge found that there was inordinate delay on the part of the respondent when he said in his judgment as follows:

> The crux of the Defendants' complaint is that the Plaintiff's delay of 1 year 9 months in filing the Summons for Directions is inordinate and inexcusable. This is a matter of fact and degree, which has in the past been decided variously upon the facts peculiar to each particular case that has been brought before the court. And the court has also to bear in mind that the issue of the delay ought to be considered not necessarily in terms of a single default, unless the delay entailed by the default is grossly inordinate, but normally in the larger context of all the procedural steps required to be taken by the Plaintiff.

Order 34 r. 2 of the Rules of the High Court reads:

> **Order 34 r. 2 Time for setting down action**
>
> (1) Every order made on a summons for directions shall fix a period within which the plaintiff is to set down the action for trial and must contain an estimate of the length of the trial and the approximate number of witnesses, if any.

(2) Where the plaintiff does not, within the period fixed under paragraph (1), set the action down for trial, the **defendant** may set the action down for trial or **may apply to the Court to dismiss the action for want of prosecution** and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks just.

(3) An action set down for trial must contain an estimate of the length of the trial and the approximate number of witnesses (if any) and shall, subject to any directions under rule 4, specify the list in which the action is to be put. (Emphasis added).

From the authorities it is clear to us that the respondent's action is liable to be dismissed for want of prosecution under this Order under either one of the two limbs, namely: (a) the plaintiff's default has been intentional and contumelious, or (b) the plaintiff is guilty of such inordinate and inexcusable delay that the defendants had been prejudiced by it. This principle is clearly stated by Salleh Abas FJ (as he then was) in the decision by the Federal Court in the case of *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 at p. 153 where he said:

Before November 12, 1976 dismissal of a plaintiff's action for want of prosecution could only be ordered by the court upon an application by the defendant to that effect. The court had then no power to pull up a slumbering plaintiff who had done nothing to bring the case to a speedy trial. Since that date, however, the Rules of the Supreme Court 1957 were amended to enable the court or the judge to issue a notice to show cause to the parties requiring the plaintiff to explain why his action should not be dismissed for want of prosecution (O. 36 r. 11A(2) of the Supreme Court Rules 1957 and now O. 34 r. 8(2) of the Rules of the High Court 1980). The present position therefore is that a plaintiff's action could be dismissed for want of prosecution either on the application of the defendant or on a notice to show cause to him issued by the court, but the principle which guides the court in determining the question whether the action should be dismissed or not for want of prosecution remains the same. ...

Counsel for both sides cited to us many authorities including *Vasudevan v. Damodaran & Anor,* a recent decision of a different panel of this court. We accept the statement of the law stated by Abdoolcader J who wrote the judgment of this court as being correct. We add that not unmindful of the difficulties experienced by the Court of Appeal in England in *Biss v. Lambeth* and the Chancery Division in *Joyce v. Joyce* in applying the House of Lord's decision in *Birkett v. James,* we propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus – that the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it ...

Now it is clear to us that in the present appeal the appellants applied to strike out the respondent's action under the second limb. We believe there is no dispute in respect of this because the submissions by both parties are in respect of the delay and the prejudice to the appellants. The learned trial judge was right in treating that the application was under the second limb. In this respect Abdoolcader J (as he then was) in his judgment in the case of *Vasudevan v. T. Damodaran & Anor* [1981] 2 MLJ 150 said:

> The House of Lords in *Birkett v. James,* approving the decision of the English Court of Appeal in a trilogy of appeals reported *sub nomine Allen v. Sir Alfred McAlpine & Sons Ltd.,* held that the power of the court to dismiss an action for want of prosecution should be exercised only where the plaintiff's default had been intentional and contumelious or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant but, other than in a case of contumelious conduct on the plaintiff's part, should not normally be exercised where the delay had not extended beyond the end of the limitation period for the cause of action, and the *House further observed per curiam that where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the plaintiff must thereafter pursue his action with diligence and the action can only be dismissed (after expiry of the limitation period) for want of prosecution if the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules of the court and is inordinate and inexcusable having regard to the delay before the issue of the writ, and the delay after the issue of the writ has caused some additional prejudice to the defendant beyond that already suffered by him by reason of the delay in bringing the action. The House of Lords in Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corporation again restated and discussed these principles but held they do not apply to arbitration proceedings.*
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> We would specifically refer to the *propositions enunciated by Salmon L.J., in Allen (at page 268) to the effect inter alia in relation to the inordinate delay being inexcusable that as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable, and again with regard to the question of serious prejudice to defendants by the delay, that this may be prejudice at the trial of the issue between themselves and the plaintiff or between each other or between themselves and third parties, and that as a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.* The decision of the English Court of Appeal in *Biss v. Lambeth, Southwark and Lewisham Area Health Authority (Teaching)* (distinguishing *Birkett* on a point under the English Limitation Acts, 1939 to 1975 not material for the purposes of the present appeal) is to the effect that in determining whether the delay after the writ had been issued is substantial, the court has to consider whether the delay has prejudiced both a fair trial and the defendants, and in considering the prejudice to the defendants, the delay after the issue of the writ has to be considered against the delay before issue, and whether such delay

has substantially prejudiced the defendants. We would draw particular attention to the judgment of Lord Denning M.R., stating (at page 389) that prejudice to a defendant by a plaintiff's delay is not limited to the death or disappearance of witnesses of their fading memories or in the loss or destruction of records since there is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial.

The Court of Appeal in the case of *Hongkong Bank (M) Bhd. v. Raja Letchumi a/p Ramarajoo & Ors.* [1996] 2 MLJ 34 followed the decision of *Vasudevan v. T. Damodaran & Anor*. On the question of prejudice Gopal Sri Ram JCA (delivering the judgment of the court) at p. 44 said:

In our judgment, the prejudice that will occur when a case is required to be tried several years after its institution and the occurrence of the events giving rise to the alleged cause of action is in itself a ground for striking out an action ...

In the case of *Department of Transport v. Chris Smaller (Transport) Ltd.* [1989] 1 All ER 897 the House of Lords held:

Inordinate and inexcusable delay by the plaintiff in prosecuting an action after the limitation period had expired was not a ground for striking out the action for want of prosecution unless the defendant had suffered prejudice from the delay or a fair trial of the issues was impossible. However, where a long delay before the issue of the writ had caused the defendant prejudice he only had to show something more than minimal additional prejudice as the result of post-writ delay to justify the action being struck out.

At p. 904 Lord Griffiths said:

Counsel for the plaintiffs submitted that the prejudice that entitled a defendant to strike out an action should be limited to proof of prejudice in the conduct of the litigation. This seems to me to be but another way of saying that delay has prevented a fair trial of the action; but in both *Allen v. Sir Alfred McAlpine & Sons Ltd.* and *Birkett v. James* reference is made to the risk both that there could not be a fair trial of the action and of prejudice to the defendants, which, one would suppose, was intended to mean some prejudice other than the mere inability to have a fair trial. Counsel for the plaintiffs frankly conceded that the weight of authority was against his submission. In *Biss v. Lambeth Southwark and Lewisham Area Health Authority* [1978] 2 All ER 125, [1978] 1 WLR 382 Lord Denning MR and Geoffrey Lane LJ considered that the anxiety suffered by nurses whose professional competence was in question was a sufficient prejudice in that case to justify striking out the action, and they also instanced the prejudice that might be caused to a small business with a huge claim hanging over it as another example of prejudice that would justify making a striking out order. In *Tolley v. Morris* [1979] 2 All ER 561 at 568, [1979] 1 WLR 592 at 600 Lord Diplock said:

> *Biss's* case was concerned with the nature of the prejudice that must be shown, a matter that it was not necessary to discuss in *Birkett v. James.* I see no reason for disagreeing with the actual decision in *Biss's* case ...
>
> The decision of the Court of Appeal in *President of India and Union of India v. John Shaw & Sons (Salford) Ltd.* [1977] Times, 27 October and *Bridgnorth DC v. Henry Willcock & Co. Ltd.* [1983] CA Transcript 958 are further examples of the court taking business prejudice into account as a ground for striking out, and *Haynes v. Atkins* [1983] Times, 12 October is an example of delay hanging over a professional man being taken into account as a ground of prejudice. In the face of this powerful line of authority, I cannot accept the submission of counsel for the plaintiffs. These authorities clearly establish that prejudice may be of varying kinds and it is not confined to prejudice affecting the actual conduct of the trial. It would be foolish to attempt to define or categorise the type of prejudice justifying striking out an action, but there can be no doubt that if the defendants had been able to establish significant damage to their business interests, flowing directly from the culpable delay of 13 months after the issue of the writ, a judge would have been entitled to regard it as prejudice justifying striking out the action. ...

From the above authorities it is clear to us that the prejudice is not confined only to adducing evidence in court but also to prejudice which a defendant would have suffered due to delay such as affecting the limitation period, a fair trial is not possible, and business interests.

In the present appeal as we have stated earlier the trial judge found inordinate and inexcusable delay on the part of the respondent. In our view the learned judge had erred when he said that in order for the defendants to succeed there must be **grossly inordinate delay**. We have gone through the authorities and we could not find anywhere to show that there must be **grossly inordinate delay**. The law clearly states that there must be inordinate and inexcusable delay and that the defendants had been prejudiced by it. Since the learned judge has found inexcusable and inordinate delay on the part of the respondent the issue before us now is whether because of the delay the appellants are prejudiced by that delay.

The respondent's cause of action arose on the day his premises were demolished which was on 13 October 1987. The respondent's claim is for trespass and damages and also loss of chattels. The respondent filed his writ and statement of claim on 22 September 1993 which was five years eleven months after the cause of action had arose which was merely one month before the limitation period set in. Though the action is not time-barred, this fact is important to show whether the appellants had been prejudiced. According to

the authorities which we have referred earlier it is clear to us that the period from the time the cause of action arose to the time of the filing of the writ and statement of claim is important. As has been held in the case of *Department of Transport v. Chris Smaller (Transport) Ltd.* [1989] AC 1197, a long delay in issuing the writ had caused the defendant prejudice and he only had to do something more than minimal additional prejudice to justify the action being struck out. The appellants in their evidence by way of affidavit stated that the demolition of the respondent's premises was carried out by their employees. These employees had now left the services of the appellants. It appears to us before the demolition of the respondent's premises inventory of goods and articles were taken and recorded by the employees before they were removed from the premises.

Only after the removal of those goods and articles to another place the premises were demolished. Appellants in their evidence said that some of those employees had left the appellants' employment and could not be traced. The respondent did not dispute this piece of evidence. We are of the view that since the present action is on trespass and damages and also a claim for missing articles, the evidence of these employees is important to rebut the allegations by the respondent. We are also of the view that action on trespass should be acted promptly in order to avoid more damages being done. Thus the delay in instituting the present action by the respondent after more than five years in the case of trespass had caused the appellants considerable injustice. This is coupled with a claim for damages and a claim for missing articles.

After the filing of the writ on 22 September 1993, the respondent took out the summons for directions on 29 August 1995. Thus there was another delay which was about one year and nine months after the pleadings were deemed to be closed (O. 25 r. 1 of the Rules of the High Court 1980). For reasons best known to the respondent the summons for directions was not served on the appellants until 8 February 1996. From 29 August 1995 until 8 February 1996 the summons for directions was left somewhere in the registry. There was no evidence to show that the respondent did anything to prompt the court to give a return date for that summons. This state of affairs continued until the court issued a notice to show cause to the respondent under O. 34 r. 8(2) of the Rules of the High Court 1980. However, no order was made. On 6 February 1996 the appellants filed the present action to strike out the respondent's action under O. 34 r. 2 of the Rules of the High Court 1980. As can be seen from the record, the appellants' application was before the service of the summons for directions on the appellants.

In the affidavit in support of this application the appellants stated the grounds for being prejudiced in para. 9 which are as follows:

9. Kami sesungguhnya mempercayai bahawa:

(i) isu-isu penting dalam guaman ini adalah berdasarkan fakta-fakta.

(ii) dengan berlalunya masa yang kian lama, daya ingatan semakin kabur untuk saksi-saksi dan tidak mungkin untuk mereka memberi keterangan yang perinci dan betul mengenai perkara-perkara yang berlaku.

(iii) Sebahagian saksi-saksi defendan-defendan telah meninggalkan pekerjaan mereka dengan defendan-defendan dan kami menghadapi masalah mengesan mereka, dan ini akan memudaratkan pembelaan defendan-defendan.

(iv) Hadmasa untuk kausa tindakan plaintif telahpun berakhir.

(v) Kelakuan plaintif dari mula lagi patut dihina dan sengaja dilakukan. Plaintif memulakan tindakan ini semata-mata untuk mengganggu defendan-defendan untuk membayar gantirugi yang tidak perlu dan patut dibayar.

(vi) Tindakan ini telah berlanjutan dari 22hb. September 1993 tanpa sebarang penentuan.

[Roughly in English it states –

9. We truly believe that:

(i) the main issues in this suit are based on facts.

(ii) with the passing of time, the memory of the witnesses are vague and it is not possible for them to give detailed and correct evidence of the incident.

(iii) Some of the defendants' witnesses had left the employment of the defendants and we ecountered problems tracing them, and this is detrimental to the defence of the defendants.

(iv) The limitation period of the plaintiff has also lapsed.

(v) The character of the plaintiff from the beginning should be despised and was done on purpose. Plaintiff's cause of action was only to agitate the defendants into paying for damages which was unnecessary and ought not to be paid.

(vi) This cause of action has been prolonged from 22nd September 1993 without any clarity.]

The respondent filed two affidavits in reply. In none of them did the respondent deny or challenge sub-paras. (i), (ii) and (iii) of the appellants' affidavit. Neither did the respondent reply to the facts given by the appellants in those sub-paragraphs nor request for the witnesses to be named. In other words respondent due to the passage of time is deemed to accept the facts that some of the witnesses could not be traced and some of them may not be able to remember what had taken place. It must be remembered that evidence in this application is by way of affidavit. Because of that we are of the view that the learned trial judge had erred when he held that "on the question of substantial risk of a fair trial, the defendants have also failed to identify the person/persons who are material witnesses who, allegedly, have since left the employ of the defendants and cannot now be traced" since the averments in the affidavit of the appellants in respect of the witnesses were never challenged.

It is clear to us the claim by the respondent as to the chattels whether they were missing or not or they ever existed could only be established by way of oral evidence by witnesses who were present when the demolition took place. In his statement of claim the respondent stated that some valuables valued at RM26,900 were missing when the premises were demolished. The appellants in their defence had requested the respondent to furnish and name the valuables kept in the premises but the respondent refused to do so. The appellants stated in the defence that all things found in the premises had been removed to another place and an inventory was made. The appellants denied that there were any valuables in the premises at the time when the demolition took place. It is only fair to counter such serious allegations the appellants get those people who took part in the demolition to be witnesses but due to inordinate and inexcusable delay on the part of the respondent they could not be traced. It is obvious to us the appellants may be prejudiced of a fair trial because of this. As decided in the case of *Department of Transport v. Chris Smaller (Transport) Ltd.* where there is a long delay before the issue of the writ and had caused the defendant prejudice he only had to show something more than the minimal prejudice as the result of the post-writ delay. It is clear to us that the respondent took out the writ five years and eleven months after the cause of action has arose which was one month before the limitation period set in. In our view there is a long delay before the issue of the writ. It is also clear to us that after the pleadings were deemed to be closed the respondent did nothing for more than one year and nine months to set up the case for hearing. Only then the respondent filed his summons for directions. This was aggravated by the fact that the summons for directions was not served on the appellants until five months later after the court had issued a notice to show cause and the appellants made an application to strike out the respondent's writ and claim. This is the post writ delay as stated in the *Chris*

Smaller case. No reason was given by the respondent of this post writ delay. The respondent let the matter take its slumber until the court nudged him with the notice to show cause and the appellants nudged him with an application to strike out the respondent's writ and claim which is the subject matter of this appeal. As such from the authorities it is clear that the appellants have only to show something more than a minimal prejudice in order to succeed. In the present appeal as we have made it clear earlier the action by the respondent is on trespass and damages for loss of chattels (valuables) which in our opinion depended to a large extent on the testimonies of witnesses who were present at the scene especially when it is trespass where it should be proceeded upon with such haste to show that the trespass had caused considerable damage to the respondent and the missing articles which should be fresh in everybody's mind. Thus when the appellants stated in the affidavit that their witnesses who carried the demolition on the instruction of the appellants are not available because they have left the services of the appellants, the appellants had succeeded to show that they are prejudiced of a fair trial. The respondent in his affidavit has not denied or disputed this.

For the above reasons we find that the inordinate and inexcusable delay on the part of the respondent had prejudiced the appellants of a fair trial. As such we will allow the appeal by the appellants.

Recently we came across two English decisions in respect of case flow management. The first is the case of *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd. and Others* and *Chishty Coveney and Co. v. Raja* reported in The Times Law Reports, 29 December 1997 at p. 698 which was a decision of the Court of Appeal where it was held:

> Pending the introduction of case flow management by the courts in April 1999, the importance of litigants observing the time limits specified by the Rules of the Supreme Court and the County Court Rules was emphasised by the Court of Appeal.

Lord Woolf MR said:

> In *Department of Transport v. Chris Smaller (Transport) Ltd.* ([1989] AC 1197) Lord Griffiths identified the advantages which could accrue from a civil procedural process which was subject to court controlled case management techniques. That process was now being introduced. The new unified rules were intended to come into force in April 1999.
>
> However, many aspects of the process could be introduced while the existing Rules of the Supreme Court and County Court Rules were in force. Most of the powers which the court required for the purposes of case management were already contained in the existing rules.

The gradual change to a managed system which was taking place did impose additional burdens upon the courts, involving the need for training and the introduction of the necessary technological infrastructure.

It was therefore in the interests of litigants as a whole that the court's time was not unnecessarily absorbed in dealing with the satellite litigation which was created by non-compliance with the timetables laid down in the rules.

In *Birkett v. James* the consequence of inordinate delay was not a consideration which was in issue. From now on it was going to be a consideration of increasing significance.

Litigants and their legal advisers had therefore to recognise that in the future any delay which occurred would be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it was, but also in relation to other litigants and the prejudice which was caused to the due administration of justice.

The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

The second case is also the decision of the Court of Appeal in *Choraria v. Sethia* reported in The Times Law Reports, 29 January 1998 at p. 43. It is interesting to note what Nourse LJ has to say in respect of delay especially delay which involved complete, total or wholesale disregard of the rules of the court. He said:

... the plaintiff's claim was for repayment of loans allegedly made to the defendant in 1982. The defendant sought to strike out the action on the familiar ground under the second limb of *Birkett v. James* ([1978] AC 297), namely inordinate and inexcusable delay on the part of the plaintiff giving rise to a substantial risk that it was not possible to have a fair trial or to prejudice to the defendant.

Mr. Justice Rimer found that there had been inordinate and inexcusable delay in prosecuting the action, a finding not questioned by the plaintiff, but concluded that no relevant prejudice to the defendant had been established.

Mr. Munby submitted that the plaintiff's conduct amounted to an abuse of the process of the court, so that the action fell to be dismissed on that ground alone, without the need to show prejudice, by application of the principle authoritatively recognised by the House of Lords in *Grovit v. Doctor* (The Times April 25, 1997; [1997] TLR 214; [1997] 1 WLR 640) and by the Court of Appeal in *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd.* (The Times December 29, 1997; [1997] TLR 698).

In *Grovit* a libel action was struck out under the second limb of *Birkett v. James,* abuse of process, being the continuation of litigation with no intention of bringing it to a conclusion.

Arbuthnot was a case where the facts were comparable with those of the present case. After referring to *Birkett v. James* and dicta of Lord Justice Parker in *Culbert v. Stephen G. Westwell & Co. Ltd.* ([1993] PIQR 54, 65) it was said that abuse of process was "a separate ground for striking out or staying an action (see *Grovit v. Doctor* (642H-643A)) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible.

Mr. Macdonald submitted that in *Arbuthnot* the court only intended to state the law as it would be applied in regard to breaches of the rules or orders committed after that case had been decided. That submission was unacceptable: the court in *Arbuthnot* was declaring the law as it had been then and as it was now.

The law, as it applied to this case could therefore be stated thus: Although inordinate and inexcusable delay alone, however great, did not amount to an abuse of process, delay which involved complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences, was capable of amounting to such an abuse, so that, if it was fair to do so, the action would be struck out or dismissed on that ground.

That was the principle on which the court had now to act. Whether it was identified as being comprehended within the first limb of *Birkett v. James* or as one having an independent existence appeared to be a point of no importance.

The plaintiff's failure to comply with an order to set down after he had survived the first application to strike out was, at the least, a piece of breathtaking insouciance. Combining it with all his previous defaults, he had acted in wholesale disregard of his obligations.

In that case the defendant's appeal to strike out the plaintiff's claim was allowed.

From our observation, it is clear to us that from the two cases there emerge an additional limb to strike out a plaintiff's claim. The original two limbs had been laid down in *Birkett v. James.* We are not sure whether it is an offshoot of the second limb or it is a third limb. Be that as it may this limb is important in view of the recent development in respect of case flow management. This new development is to overcome the backlog of cases now existing in courts in England. This new limb as we understood it to be from the two cases in that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse

so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions too it appears to us that there is no necessity to show prejudice in such cases. As can be seen the law in respect of case flow management in England will only be in operation in 1999 yet the courts there had already put many aspects of its operation to use.

There is no denial that in this country we have backlog of cases due to unnecessary delay. In fact in some courts the learned judge had taken the initiative to introduce case flow management in order to hasten the hearing of actions brought before his court. The importance of case flow management is for the parties to observe the time limits as provided by the law so that the action could be brought to trial within time. It is true that some parties had caused unnecessary delay due to non observance of the time schedule provided by the Rules. We have amended certain provisions in the Rules of the High Court whereby time limits are given such as filing of affidavits. Our courts are definitely moving towards this case flow management era. As such we see no reason why we should not adopt the principles stated in those two decisions.

In the present appeal, from the facts it is clear to us that the respondent and his counsel had caused significant delay by their inaction, such as filing the writ one month before limitation period set in and filing summons for directions and serving them on the appellants. The respondent was prompted by the court and the appellants to proceed to the next step. It is clear to us that the delay was caused by the inaction of the respondent and his solicitors to pursue this case. The respondent and his solicitors appeared to be sleeping until they were awakened by the court by the notice to show cause. We had gone through the affidavit filed by the respondent and there was no explanation for the delay. The only excuse given was the delay was not deliberate and the delay was not inordinate. Though the solicitors for the respondent gave the reason that the court's file was missing there was no such evidence shown in the affidavit. On the contrary the file was in the court all the time because the court had issued the notice to show cause which shows that the file was all the time in the court and the inaction on the part of the respondent. It is also obvious to us that no action whatsoever had been taken by the respondent to set the motion to hear the action after the summons for directions had been filed. When the respondent filed his summons for directions and that no return date was given he kept quiet. At least the respondent or his solicitors should ask the court. Failure by the respondent to do so appears to be his inaction. It appears to us that this falls squarely on what had been decided in the two recent decisions referred earlier. It is clear to us that the respondent has not taken any step to dispose of the litigation within reasonable time as stated by Lord Woolf MR. In the case of *Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd. & Others (supra)* where he said:

> The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

He also said:

> The change in culture which was already taking place would enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules was an abuse of process.
>
> *While an abuse of process could be within the first category identified in Birkett v. James, it was also a separate ground for striking out or staying an action, which did not depend on the need to show prejudice to the defendant or that a fair trial was no longer possible.* (Emphasis made).

Nourse LJ in the case of *Choraria v. Sethia (supra)* put it more bluntly when he said:

> The law, as it applied to this case could therefore be stated thus: Although inordinate and inexcusable delay alone, however great, did not amount to an abuse of process, delay which involved complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences, was capable of amounting to such an abuse, so that, if it was fair to do so, the action would be struck out or dismissed on that ground.
>
> That was the principle on which the court had now to act. Whether it was identified as being comprehended within the first limb of *Birkett v. James* or as one having an independent existence appeared to be a point of no importance.

If we adopt the principles laid out in the two cases, we find that the respondent and his solicitors had disregarded totally the time schedule given by the rules without any excuse.

The appeal should be allowed with costs here and below. The order of the learned High Court judge is set aside and the respondent's claim is hereby struck out. The deposit to be refunded to the appellants.